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Supreme Court
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No. 00-346

IN THE

SUPREME COURT OF THE UNITED STATES

NORFOLK SHIPBUILDING
& DRYDOCK CORPORATION

Petitioner,

v.

CELESTINE GARRIS, ADMINISTRATRIX OF THE ESTATE
OF CHRISTOPHER GARRIS, DECEASED

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. PRELIMINARY STATEMENT

This Court should grant a writ of *certiorari* in this case to resolve a tripartite split in the federal courts of appeal and state supreme courts over the scope of the remedy created by the short-lived but often cited Moragne v. States Marine Lines, 398 U.S. 375 (1970). Celestine Garris's ("Garris") Brief in Opposition attempts, but fails, to explain why this issue does not merit this Court's attention. The new (and surprising) argument asserted by Garris is that Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199 (1996), resolved the question presented in this case. To the contrary, Yamaha merely reserved this question for another day. Petitioner respectfully submits that that day has come.

II. ARGUMENT

In her Brief in Opposition, Garris asks the Court to ignore the discordant judicial interpretations regarding the remedy created in Moragne. She argues that Yamaha "determined the existence of a negligence-based wrongful death action under general admiralty law." Brief in Opposition at 8. Garris confidently asserts — in her *second* argument section — that Yamaha "answered in the affirmative the question of whether there is a general maritime negligence-based wrongful death action." Brief in Opposition at 8.[1]

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[1] Likewise, as a result of Yamaha (and the more recent federal court authorities), Garris "is confident that when the Virginia Supreme Court is presented with the question again, it will" overrule Brown v. Brown, 309 S.E.2d 586 (Va. 1983), cert. denied, 467 U.S. 1242 (1984), and "follow the overwhelming authority . . . which recognizes a general maritime wrongful death cause of action premised on negligence." Brief in Opposition at 8. Garris's own actions belie

(continued . . .)

Garris's argument overlooks plain language in the Yamaha opinion reserving the question of what remedies Moragne created. In its opinion in this case, the Fourth Circuit noted this plain language: "[W]e note that the [Supreme] Court in footnote seven [of Yamaha] expressly refrained from addressing this question . . . ." App. 15. The Eastern District of Virginia's opinion in this case similarly concludes: "A thorough analysis of Yamaha reveals that in Yamaha, the Supreme Court reserved the issue of whether a wrongful death action sounding in negligence exists under general maritime law." App. 50. As Yamaha succinctly stated: "The question we confront is not what Moragne added to the remedial arsenal in maritime cases, but what, if anything, it removed from admiralty's stock." Yamaha, 516 U.S. at 210 n.7; see App. 15. Thus, notwithstanding Garris's unsupported arguments to the contrary, this Court did not address in Yamaha whether Moragne created a wrongful death cause of action sounding in negligence.

Championing the Yamaha opinion even further, Garris boldly pronounces, "[n]o court or commentator writing after the Yamaha opinion was handed down has agreed with NORSHIPCO's argument." Brief in Opposition at 9. Garris's statement overlooks the fact that the Eastern District of Virginia agreed with NORSHIPCO and held that Garris had no negligence-based general maritime law claim to plead in this case. See App. 44, 48-50. The

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her purported confidence. Garris originally filed her wrongful death claim in Virginia state court but nonsuited the case and refiled in federal court rather than confront the Brown decision in state court. Furthermore, Garris's legal counsel lost this exact issue in a lower state court case in 1997, yet declined to appeal the case to the Supreme Court of Virginia to seek a reversal of Brown. See Johnson v. Walsh, 41 Va. Cir. 314 (Va. Beach Cir. Ct. 1997).

Fourth Circuit then considered NORSHIPCO's argument and "agree[d] with the district court and conclude[d] that Moragne did not recognize a general maritime law cause of action for wrongful death based upon negligence." App. 19.

While the Fourth Circuit held that Moragne did not create a negligence-based remedy, it went on to create one. This decision implicates significant policy considerations. First, the opinion exacerbates rather than resolves the already existing split in authorities on the proper interpretation of Moragne. Compare Ford v. Wooten, 681 F.2d 712, 714 (11th Cir. 1982), cert. denied, 459 U.S. 1202 (1983); Ivy v. Security Barge Lines, Inc., 606 F.2d 524, 527 (5th Cir. 1979), cert. denied, 446 U.S. 956 (1980); Brown v. Brown, 309 S.E.2d 586, 590 (Va. 1983), cert. denied, 467 U.S. 1242 (1984), with Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084, 1088 (2d Cir. 1993), cert. denied, 510 U.S. 1114 (1994); Miles v. Melrose, 882 F.2d 976, 985 (5th Cir. 1989), aff'd sub. nom. on other grounds, Miles v. Apex Marine Corp., 498 U.S. 19 (1990); Nelson v. United States, 639 F.2d 469, 473 (9th Cir. 1980); General Chemical Corp. v. De La Lastra, 852 S.W.2d 916, 919 (Tex.), cert. dismissed, 510 U.S. 985 (1993). Without guidance from this Court, the lower federal courts and state supreme courts will continue to struggle over the true meaning of the remaining vestiges of Moragne.[2]

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[2] The holding of Moragne was short-lived. Congress overruled Moragne by statute when it passed the 1972 amendments to the Longshore and Harbor Workers' Compensation Act. E.g., App. 42 (Widener J., dissenting opinion); see Miles v. Apex Marine Corp., 498 U.S. 19, 28 (1990). The question here is whether there is enough left of Moragne to extend it to create yet another judge-made remedy.

Second, because it creates a new cause of action for deaths in state territorial waters, the Fourth Circuit's opinion raises the question of the proper balance between uniformity and federalism in maritime law. The need — or lack of a need — for uniformity has frequently been debated in case law and commentary. See Yamaha, 516 U.S. at 210 n.8; American Dredging Co. v. Miller, 510 U.S. 443, 450-51 (1994); Robert Force, Post-Calhoun Remedies for Death and Injury in Maritime Cases: Uniformity, Whither Goest Thou?, 21 Tul. Mar. L.J. 7 (1996); Robert D. Peltz, The Myth of Uniformity in Maritime Law, 21 Tul. Mar. L.J. 103 (1996). The lower federal courts currently operate without clear guidance on the interplay of uniformity and federalism in state territorial waters.

Last, the Fourth Circuit's opinion implicates separation of powers concerns. On more than one occasion in the last 10 years, this Court has cautioned against adding general maritime law remedy and recovery schemes in areas both where Congress has legislated and where Congress has had the opportunity to legislate but declined to do so. See Dooley v. Korean Air Lines Co., Ltd., 524 U.S. 116, 122-24 (1998); Miles v. Apex Marine Corp., 498 U.S. 19, 36-37 (1990). In his dissenting opinion to the Fourth Circuit's decision not to rehear this case *en banc*, Judge Widener highlighted one of many separation of powers concerns — the conflict between the Fourth Circuit's new remedy and "explicit" Congressional intent found in the Longshore and Harbor Workers' Compensation Act. App. 41-43. This Court should accept this case and provide guidance on the proper extension of judge-made remedies into legislated areas of maritime law.

III. CONCLUSION

Garris's Brief in Opposition falls far short of explaining that this case does not deserve a writ of *certiorari*. Garris merely argues that Yamaha answered all of Moragne's unanswered questions. This argument is absolutely refuted by footnote 7 in Yamaha. In footnote 7, this Court stated that it did not determine "what Moragne added to the remedial arsenal in maritime case . . . ." Yamaha, 516 U.S. at 210 n.7. The Court should grant a writ of *certiorari* in this case and explain what Moragne added to the remedial arsenal in maritime cases. Thirty years has been long enough to leave this question unanswered.

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